IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

SA.No. 831 of 1993(G)

AS.26/1989 of SUB COURT, HOSDRUG
OS.326/1986 of MUNSIFF COURT, HOSDRUG

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APPELLANT/ RESPONDENTS 2 TO 6/ ORIGINAL II DEFENDANT AND LEGAL REPRESENTATIVES OF I DEFENDANT:

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1. KOTTAYIL MOHANAN NAMBIAR, TEACHER RESIDING AT KOTTAYIL HOUSE, AJANUR IN EAST ELERI VILLAGE OF HOSDRUG TALUK, P.O.KAMBALLOORE.

*2. K.NARAYANI, KOTTAYIL HOUSE, WEST ELERI VILLAGE.P.O AJANUR

DIED. LRS RECORDED

3. K.RAGHAVAN NAMBIAR, KOTTAYIL HOUSE, WEST ELERI VILLAGE, P.O.AJANUR

DIED. LRS IMPLEADED

4. K.SREEDHARAN NAMBIAR, -DO- -DO-

5. K.RAVINDRAN NAMBIAR, -DO- -DO-

* APPELLANTS 1,3 TO 5 ARE RECORDED AS THE LEGAL HEIRS OF DECEASED 2ND APPELLANT AS PER ORDER DT.10/9/99 IN CMP 1703/99

BY ADV. SRI.GIRI.V. & M.SASINDRAN

RESPONDENT/APPELLANT/PLAINTIFF:

KODOTH RAJAMMALU AMMA RESIDING IN KEKKANISSERI DESOM OF PAYYANNUR AMSOM OF TALIPARAMBA TALUK, P.O.PAYYANNUR

DIED. LEGAL REPRESENTATIVES OF DECEASED SOLE RESPONDENT ARE IMPLEADED AS ADDL. RESPONDENTS 2 TO 7 AS PER ORDER DATED 30/5/2006 IN CMP 1702/99

ADDL.R2 KODOTH VALSALA, D/O.RAJAMMALU AMMA, SREEPURAM MADATHUMPADI TEMPLE ROAD, NEAR SREEPRASADAM AUDITORIUM, KEKKANISSERI.P.O., PAYYANNUR, KANNUR DISTRICT

ADDL.R3 KODOTH SURESH, S/O.RAJAMMALU AMMA, RESIDING AT -DO-

ADDL.R4 KODOTH KUTTYKRISHNAN, S/O.RAJAMMALU AMMA, RESIDING AT -DO- -DO-

ADDL.R5 KODOTH RAJEEVAN, -DO- -DO-

ADDL.R6 KODOTH SREEKUMAR -DO- -DO-

ADDL.R7 KODOTH NIRMALA -DO- -DO-

LEGAL REPRESENTATIVES OF DECEASED 3RD APPELLANT ARE IMPLEADED AS ADDL. RESPONDENTS 8 TO 15 AS PER ORDER DATED 30/5/06 IN CMP 1697/99

ADDL.R8 P.V.AMMALU AMMA, W/O.RAGHAVAN NAMBIAR, RESIDING AT PADINHARE VEETTIL, AJANUR, CHITTARAKKAL VILLAGE KAMBALLUR, CHERUPUZHA, KASARGODE.

ADDL.R9 P.V.PRASANNA, D/O.RAGHAVAN NAMBIAR, RESIDING AT -DO- -DO-

ADDL.R10 P.V.DIVAKARAN, S/O.RAGHAVAN NAMBIAR, -DO-

ADDL.R11 P.V.SAJEEVAN, S/O.RAGHAVAN NAMBIAR, -DO- -DO-

ADDL.R12 P.V.SAVITHRI, D/O. -DO- -DO-

ADDL.R13 P.V.SATHEESAN, S/O.-DO- -DO-

ADDL.R14 P.V.SATHI, D/O. -DO- -DO-

ADDL.R15 P.V.RAJESH -DO- -DO-

BY ADV. K.SHRIHARIRAO & K.R.RAGHUNATH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.2027/93 IN SA 831/93

DISMISSED

18/6/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 831 OF 1993

Dated 18th June 2007

J U D G M E N T

Second defendant and legal heirs of deceased first defendant in O.S.326 of 1986 on the file of Munsiff court, Hosdurg are appellants. Plaintiff is respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction restraining defendants from trespassing into the plaint schedule property. As per the original plaint, plaint schedule property was having an extent of 30 cents in R.S.No.115/1 of East Eleri village. Plaint was subsequently amended reducing the extent to 23 cents. Respondent contended that plaint schedule property originally belonged to Kamballoor Kottayil tharawad and was outstanding in the possession of Sreekantan as a tenant and under Ext.A1 assignment deed dated 27/10/1971 12 acres including plaint schedule property was assigned to the respondent and she subsequently purchased jenmom right as per order in S.M.P.227 of 1978 on the file of Land Tribunal,

Neleshwar and O.S.222 of 1974 was earlier instituted seeking a decree for injunction against defendants in respect of the property including the plaint schedule property and it was decreed and respondent is in possession of the property and defendants are attempting to trespass into the property and they have no right to do so and therefore they are to be restrained by a decree for permanent prohibitory injunction.

2. Defendants in their written statement contended that Sreekantan, the assignor under Ext.A1 had no right or possession over the property and Ext.A1 was fraudulently obtained and Kunhiraman Nambiar father of respondent was a member of Kamballoor Kottayil tharawad,so also Uchira Amma mother of first defendant and there was a partition in that family in 1959 whereunder properties were divided and allotted to A thavazhy and B thavazhy and Kunhiraman Nambiar belonged to A thavazhy and Uchira Amma belonged to B thavazhy. On the death of Uchira Amma her rights devolved on her children including first defendant and sister of first defendant. Mother of second defendant Narayani Amma had been in possession of the property as a part and parcel of an extent of 3.50 acres and plaint schedule property

is part of that property and respondent is not entitled to the decree sought for.

3. Learned Munsiff framed necessary issues. A commission was appointed and Commissioner submitted Ext.C1 report and Ext.C2 plan. It was thereafter plaint was amended reducing the extent and survey number of the southern boundary. On the side of plaintiff seven documents were marked and two witnesses including husband of respondent were examined. On the side of defendants ten exhibits were marked and three witnesses including second defendant and Commissioner in O.S.239 of 1974 were examined. Learned Munsiff on the evidence found that plaint schedule property was not properly identified and respondent did not establish that plaint schedule property has been in her possession and dismissed the suit. Respondent challenged the decree and judgment before Sub court, Hosdurg in A.S.26 of 1989. Learned Sub Judge on re-appreciation of evidence found that though plaint schedule property was not identified, as claimed by respondent plot C in Ext.C2 plan is the plaint schedule property and evidence establish that respondent has been in possession of the property and granted a decree for permanent prohibitory

injunction. It is challenged in this second appeal.

4. Second appeal was admitted. The following substantial question of law was formulated.

> When first appellate court specifically found that description of plaint schedule property is not correct, was it justified in granting decree for permanent prohibitory injunction in reversal of the findings of the trial court.

5. Learned counsel appearing for appellants was heard. There was no representation for respondent.

6. Plaint schedule property after amendment is having 23 cents in R.S.115/1 East Eleri village. As per the description of the property in the plaint it lies to the west of thodu and kavu, to the north of property in the possession of respondent in R.S.No.115/1 and to the east west and north of the property of respondent under same sub division. What was contended in the plaint was that plaint schedule property is part of the property obtained under Ext.A1 assignment deed from Sreekantan who was a tenant under the tharawad. Ext.A1 takes in several items of properties. Item No.7 is the property comprised in R.S.No.115/1. Total extent shown is 12 acres. Boundaries of the said item are the

common boundaries to all the items. Separate boundaries of each item of properties or that of item No.7 was not shown. Specific case in the plaint was that subsequent to Ext.A1 assignment Ext.A2 purchase certificate was obtained from Land Tribunal. Though it was pleaded in the plaint that purchase certificate was granted as per order in O.A.227 of 1978, Ext.A2 shows that it was a suo motu proceedings. Respondent also contended that subsequent to Ext.A1 when it was measured the total extent was found to be 11 acres and respondent alienated portions of the property and what was left with her was 3 and odd acres and plaint schedule property is portion of that property. As identification of the property was disputed, commissioner was appointed. Ext.C1 report and Ext.C2 plan show that when the commissioner inspected the property what was represented to the commissioner was that plaint schedule property is plot CDLMNOP marked in Ext.C2 which comprised of plots C,D and E respectively having an extent of 23 cents, 45 cents and 5 cents respectively. Thereafter respondent reduced the extent of the plaint schedule property to 23 cents by amending the plaint. When evidence was let in, husband of respondent, as PW1, deposed that plaint schedule

property is plot C having an extent of 23 cents. When it was specifically pleaded in the plaint that in respect of the properties covered under Ext.A1, there was an attempt to trespass and so O.S.222 of 1974 was filed and Ext.A3 decree was obtained and plaint schedule property is part of that property. Ext.A4 is the judgment and Ext.A3 the decree. Ext.A3 decree shows that there are two items of property. First item was 10 cents in R.S.161/3 and second item was 5 cents in R.S.115/1 A3. Commissioner in Ext.C1 plaint identified 5 cents comprised in R.S.115/1 A3 as plot E marked in Ext.C2 plan. Other item is in R.S.No.161/3, which could only be further to the west and south of that property. Therefore, if plaint schedule property is part of the property covered under Ext.A3 decree, as rightly argued by learned counsel appearing for appellants, it could only be either part of the property comprised in R.S.161/3 or plot E and cannot be plot C. Learned Munsiff elaborately considered the evidence and found that description of the property does not establish that identity of plaint schedule property as plot C and held that as respondent did not establish the identity of the property she is not entitled to the decree sought for.

Unfortunately, first appellate court did not properly appreciate the evidence. Relying on averments in the written statement to the effect that "plaintiff has no property on the west of thodu and kavu and plaintiff is liable to take out a commission for proper identification of the property", learned Sub Judge held that as the property lies further to the west of thodu and commissioner has identified the plaint schedule property in Ext.C2 plan, respondent is entitled to the decree. First of all, commissioner did not identify plot C as the plaint schedule property.

7. When suit is one for permanent prohibitory injunction and that too filed on the basis that plaint schedule property is part of the property which was retained by respondent after alienating portions of the property obtained under Ext.A1 respondent should have produced the assignment deeds, whereunder portions of the properties obtained under Ext.A1, were alienated and should have identified the portion of the property if any, retained with her and established that plaint schedule property is that property. Without such identification she is not entitled to get a decree for injunction in respect of the plaint schedule property.

No attempt was made to identify the property in that way. Ext.B2 is the assignment deed executed by respondent herself to PW2. From Ext.B2 also, it is not possible to identify plot C marked in Ext.C2 plan as the remaining property left with the respondent or in her possession. In such circumstances, without proper identification of the plaint schedule property, first appellate court should not have granted a decree, which was rightly refused by the trial court. Decree for injunction could be granted only in respect of a distinct and definite item of property and not on a property with incorrect or vague description. As the respondent did not establish that plot C marked in Ext.C2 plan is the plaint schedule property and that too a portion available with her after alienations, first appellate court should not have granted the decree.

8. Appeal is allowed. The decree and judgment granted by Sub court, Hosdurg in A.S.26 of 1989 are set aside and judgment of Munsiff court, Hosdurg in O.S.326 of 1986 is restored.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.831 OF 1993

18th June 2007

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